

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

75-1108

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT S. PERSKY,

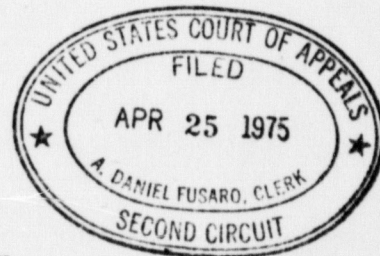
Defendant-Appellant.

ON APPEAL FROM JUDGMENT AND COMMITMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

ROBERT S. PERSKY
Attorney for Defendant-Appellant
One Rockefeller Plaza
New York, N.Y. 10020

PAUL J. CURRAN
United States Attorney
Attorney for Plaintiff-Appellee
U.S. Court House, Foley Square
New York, N.Y.



PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

APPENDIX

1a

JUDGE WYATT 73 CRIM. 192

D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.: 264-6479
vs.		David M. Brodsky, AUSA
1) MORTON S. KAPLAN	cts. 1, 2, 4, 5	
2) PHILIP ZAMB	cts. 1, 2, 3, & 6 thru 12	(Capt. 1, 2)
3) JEROME E. SILVERMAN	cts. 1, 2, 3	
4) CHARLES J. FISCHER	ct. 1	For Defendant:
5) ROBERT S. PERSKY	cts. 1, 2, 4, 5	
6) RAMON N. D'ONOFRIO	ct. 4	
7) U.S. SECRETARIAL INSTITUTE, LTD.	ct. 4	

(04) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	7/14/73	Bonded	5-	
J.S. 3 mailed/- - 3-	Marshal	7/14/73	Cloned	5-	10-
Violation comp. #72-2496	Docket fee	7/15/73	THREE		
Title					
Sec.					
see below					

DATE	PROCEEDINGS
	18:371 conspiracy to file false statements with SEC (ct. 1)
	15:780 & 78ff; 156-1 & 126-20 - filing false financial statements with SEC (ct. 2)
	18:1505 & 2 - obstruction of justice (ct. 3)
	15:783(b) & 78ff; 101-5 - use of I.C. facilities and the mails in a scheme & artifice to defraud (ct. 4)
	15:780 & 78ff - failure to file current report with SEC (ct. 5)
	18:1621 - Perjury (cts. 6 thru 12)
	Total counts: TWELVE
3-1-1973	Filed indictment - F/A ordered for deft. D'ONOFRIO -- Ward, J. R.M. D'ONOFRIO - B/W issued.
3-12-73	KAPLAN- (Atty. present) Deft. pleads not guilty. Deft. ordered photographed and fingerprinted. Deft. R.O.R. - Deft. to notify U.S. Atty. if outside Districts of Florida and So. and E. Districts of New York. -- Duffy, J.

ONLY COPY AVAILABLE

A-1

DATE	PROCEEDINGS
3-12-73	ZANE- (Atty. present) Deft. pleads not guilty. Deft. R.O.R. - Deft. ordered photographed and fingerprinted. Deft. to notify U.S. Atty. if outside Districts of N.J., So. and E. Districts of New York.
	SILVERMAN- (Atty. present) Deft. pleads not guilty. Deft. R.O.R. - Deft. ordered photographed and fingerprinted. Deft. to notify U.S. Atty. if outside Districts of N.J., E. and So. Districts of New York.
	FISCHER- (Atty. present) Deft. pleads not guilty. Deft. R.O.R. - Deft. ordered photographed and fingerprinted. Deft. is to notify U.S. Atty. if outside Districts of N.J., E. and So. Districts of New York.
	PERSKY- (Atty. present) Deft. pleads not guilty. Deft. R.O.R. Deft. ordered photographed and fingerprinted. Deft. to notify U.S. Atty. of any trips outside the U.S.A.
	D'ONOFRIO- No appearance, Court directs entry of not guilty plea.
	U.S. SECRETARIAL INSTITUTE, LTD.- Court directs entry of not guilty plea.
	ALL DEFENDANTS- motions to be made within 10 days before Judge Wyatt. Case assigned to Judge Wyatt. --- Duffy, J.
3-14-73	MORTON KAPLAN-Filed notice of appearance by Atty Robert A. Kasky 1720 Harreron St. Hollywood Fla. 33022 (305)-920-2891
3-14-73	CHARLES FISCHER-Filed notice of appearance by atty Alfred C. DeCotus 744 Broad St. Newark New Jersey (201)624-9505
3-14-73	ROBERT S. PERSKY-Filed notice of appearance by atty John Logan O'Donnelli 299 Park Ave NYC 10017 688-0400.
3-14-73	ZANE & SILVERMAN-Filed notice of appearance by atty Louis Bender 225 B... NYC 227-6000
3-19-73	Filed motion of AUSA Brodsky for disclosure of testimony.
3-19-73	Filed endorsement on Govt's motion for disclosure. This motion presented ex parte by AUSA Bradsky that represented that this disclosure request is in connection with the proceedings of deft. D'Onorfrio who has been arrested in London. For such purpose the motion is granted. The Clerk is directed to proceed as stated in the motion. So ordered Wyatt, J.
3-20-73	Pre-trial held, Trial May 7, 1973 10:00 A.M. Wyatt, J.
3-22-83	D'Onofrio-et al-Filed motion ordered sealed in accordance with Judge Wyatt order of 3-19-73, to be placed in the vault of room 602 Clerk's
4-3-73	Ch. J. Fischer- Filed notice of motion for an order directing the Govt. to furnish counsel for deft. - ret. on 4-19-73 at 1:30 P.M.

DATE	PROCEEDINGS
4-4-73	Deft's ZANE and SILVERMAN- Filed affdvt. and notice of motion for an order severing the trial of deft's and severing offenses charged.
4-6-73	Deft's ZANE and Silverman- Filed affdvt. and notice of motion for discovery and inspection.
4-6-73	Deft's ZANE and SILVERMAN- Filed affdvt. and notice of motion for a bill of particulars.
4-6-73	Deft's ZANE and SILVERMAN- Filed memorandum of law in support of defendants pre-trial motions filed this date.
4-11-73	Morton S. Kaplan-(atty. present) withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to May 18, 1973 at 2:30 Room 36. Deft. released on his own recognizance. Wyatt, J.
4-12-73	Reyes-Mailed CJA form 20 copy I to the A.O. Brieant, J.
4-24-73	Zane & Silverman-Filed stipulation with respect to defts motion for bill of particulars.
4-30-73	ZANE & SILVERMAN -Filed memo endorsed on motion filed 4-6-73***The motion is granted. ***counts 1,2,2, & 6 thru 12 will be tried. Cts. 4 & 5 will be separately tried at a later date. So ordered....Wyatt, J.... w/n
4-30-73	G.J. FISCHER - Filed memo endorsed on motion filed 4-3-73***The motion for a severance of count 1 is denied. So ordered....Wyatt, J.... w/n
4-30-73	Fischer-Filed brief of the deft in support of his motion for discovery and severance.
4-30-73	Kaplan-Filed Govt's affidavit for writ of habeas corpus writ iss, ret 5-1-73.
4-30-73	Filed Govt's memorandum of law.
5-2-73	P.ZANE - Filed Govt's answer to bill of particulars and exhibits..
5-2-73	Silverman- On motion of deft's counsel , Mr. Silverman's bail limits are extended Friday and Saturday (ie May 4 and 5, 1973) to permit the deft. to make trip to Canada. Wyatt, J.
5-3-73	M. Kaplan-Filed affidavit of service.
5-3-73	Zane and Silverman-Filed stipulation with respect to defts's motion for discovery and inspection.
5-4-73	Zane & Silverman- Filed defts' questions for voir dire. " " Filed defts' request to charge.

DATE	PROCEEDINGS
5-4-73	Persky- Filed requested examination on the voir dire.
	Persky- Filed proposed jury instructions submitted on behalf of deft.
5-9-73	Filed Govt's proposed examination of prospective jurors.
5-10-73	Filed envelope ordered sealed. To be opened only by order of this Court or by order of U.S.C.A. 2nd. Circuit. Ordered placed in the vault in room 602. Wyatt, J.
5-7-73	<div> <div> PHILIP ZANE- JEROME E. SILVERMAN- CHARLES J. FISHER- ROBERT S. PERSKY- </div> <div> as to counts 1,2,3, 6 thru 12 Jury trial begun before Wyatt, J. </div> </div>
5-8-73	Trial continued - CHARLES J. FISHER- Govt. moves to sever deft. as to count 1. Deft. and his Atty. agree. Motion for severance (ct.1) is granted. -- Wyatt, J.
5-9-73	Trial continued.
5-10-73	Trial continued. Ordered that Court exhibits 4 and 5 be sealed. To be opened only by order of this Court, or by order of the U.S.C.A. 2nd Circuit. - Wyatt, J.
5-11-73	Trial continued.
5-14-73	Trial cont'd.
5-15-73	Trial cont'd.
5-16-73	Trial cont'd.
5-17-73	Trial cont'd.
5-18-73	Trial cont'd.
5-21-73	Trial continued.
5-22-73	Trial continued.
5-23-73	Trial continued.
5-24-73	Trial continued.
5-25-73	Trial continued. Filed Govt's supplemental request to charge.

DATE	PROCEEDINGS
5-25-73	<p>MORTON S. KAPLAN - Filed Judgment (Atty. present) deft is committed for imprisonment for a period of TWO YEARS on count 1, pursuant to Ti. 18, Sec. 3651, U.S. Code on condition the deft be confined in a jail or treatment type institution for FOUR MONTHS, the remainder of the sentence of imprisonment is suspended and the deft is placed on probation for a period of TWO YEARS. Subject to the standing probation order of this court. Deft cont'd R.O.R. until June 1, 1973 at which time deft is to surrender to the U.S. Marshal in room 110, at 10:30 a.m. for service of sentence. Counts 2, 4 and 5 are dismissed on motion of deft's counsel with consent of the Govt.....</p> <p>Wyatt, J. Entered 5-29-73-----</p>
5-30-73	Trial continued from May 25, 1973.
5-31-73	Trial continued.
5-1-73	Filed Transcript of record of proceedings, dated <i>May 25, 1973</i>
5-30-73	<p>Kaplan - Filed order directing the deft to be released on his own recognizance until 6-1-73. surrender on June 1, 1973 to the U.S. Marshal in Miami Fla. at 10:30 A.M. for service of sentence. Wyatt, J.</p>
6-4-73	<p>Persky - Filed deft's comments with respect to court exhibit 21, Judge Wyatt's charge to the jury.</p>
	<p>Persky - Filed memorandum of deft. with respect to admissibility of telephone conversations.</p>
6-1-73	Filed Transcript of record of proceedings, dated <i>May 25, 1973</i>
6-1-73	<p>Filed affidavit of Sander Frankel in support of motion by defendants Zane and S. for judgment of acquittal or for a mistrial.</p>
6-4-73	Trial Cont'd.
6-5-73	Trial cont'd.
6-6-73	Trial cont'd all sides rest.
6-7-73	Trial cont'd summations cont'd.
6-8-73	Trial cont'd, summations cont'd.
6-11-73	Trial cont'd, Court charges Jury.

DATE	PROCEEDINGS
6-12-73	Trial cont'd, Jury Deliberating- Partial verdict- Philip Zane , Not Guilty on each of cts 1,3,6,7,9,10 & 11. JEROME SILVERMAN, not guilty on each of counts 1 & 3, ROBERT PERSKY, not guilty on count 1.
6-13-73	Trial cont'd, Jury deliberations cont'd. Jury finds the defts guilty as to: · PHILIP ZANE GUILTY ON COUNT 2 · JEROME SILVERMAN GUILTY ON COUNT 2 · ROBERT PERSKY GUILTY ON COUNT 2. SENTENCES on AUGUST 24, 1973 2:30 PM, PSI ordered on all defts (Zane, Silverman & Persky) defts ROR. ----Jury Disagreement as to deft PHILIP ZANE on counts 8 & 12. Wyatt, J.
6-13-73	JOHN PETER GALANIS-Filed W/H with Marshal's return-Writ Satisfied 5-15-73-Wyatt, J.
6-22-73	Morton S. Kaplan- Filed affdvt. requesting that the Judge take affirmative action and reduce the sentence given to defendant.
6-22-73	Morton S. Kaplan- Filed memo endorsed on above: "This motion to reduce sentence is denied. So ordered. - Wyatt, J." (m/n)
7-12-73	D'Onofrio- Filed acknowledgment of constitutional rights.
7-11-73	D'Onofrio-(atty. present)Pleads guilty to count 4 only. Sentence adj'd to 9-11-73. Bail continued at \$100,000. Stewart, J.
7-3-73	RAMON D'ONOFRIO-Filed CJA 23-Financial Affidavit.
8-16-73	Filed Deft Robert S. Persky affdvt & notice of motion for a new trial and judgment of Acquittal. (sent to Judge Wyatt).
8-16-72	Filed Deft Robert S. Persky memorandum of law in support.
8-16-73	Filed Deft Robert S. Persky affdvt & notice of motion to dismiss counts 4 & 5.
8-16-73	Filed Deft Robert S. Persky memorandum of law in support.
9-6-73	ROBERT S. PERSKY - Filed defts. Reply Memorandum.
9-9-73	ROBERT S. PERSKY - Filed Govt. memo in opposition to Post Trial Motions.

DATE	PROCEEDINGS
9-6-73	PHILIP ZANE-Filed JUDGMENT and COMMITMENT-(atty present)Deft. is committed to the Atty Gen'l for imprisonment for a period of TWO (2) YEARS, Pursuant to Title 18, Section 3651, U.S. Code, on condition the deft. be confined in a jail or treatment type institution for FOUR (4) MONTHS, the remainder of the sentence if imprisonment is suspended and the deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this court. Deft. released on bail pending appeal, fixed at \$1,000. P.R.B.....Wyatt, J. Issued Commitment.
9-6-73	JEROME E. SILVERMAN-Filed JUDGMENT and COMMITMENT-(atty present) Deft. is committed to the Atty Gen'l for imprisonment for a period of TWO (2) YEARS, pursuant to Title 18, Section 3651, U.S. Code, on condition the deft. is confined in a jail or treatment type institution for FOUR (4) MONTHS, the remainder of the sentence of imprisonment is suspended and the deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this court. Deft. released on bail pending appeal, fixed at \$1,000. P.R.B.....Wyatt, J. Issued Commitment.
9-6-73	ROBERT S. FISCHER-Filed JUDGMENT and COMMITMENT-(atty present)Deft. is committed to the Atty Gen'l for imprisonment for a period of TWO (2) YEARS, pursuant to Title 18, Sec. 3651, U.S. Code, on condition the deft. be confined in a jail or treatment type institution for FOUR (4) MONTHS, the remainder of the sentence of imprisonment is suspended and the deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this court. Deft. released on bail pending appeal, fixed at \$1,000. P.R.B....Wyatt, J. Issued Commitment.
9-5-73	ROBERT S. PERSKY- Filed reply memorandum Re: N. trial or set aside verdict.
6-16-73	Filed transcript of record of proceedings, dated July 11, 1973
9-12-73	ROBERT PERSKY- Filed Govt. memo in opposition to Deft. motion to dismiss Counts 4 & 5.
9-16-73	ROBERT PERSKY Filed notice of appeal from the Judgment of conviction entered on the 6th day of Sept. 1973, Mailed notice to deft. 302 W. 86th St. N.Y.C. U.S. Atty
9-16-73	SILVERMAN AND ZANE-Filed notice of appeal from the order denying the motion to set aside verdict, or in alternative for a new trial, and from the final judgment entered 6th day of Sept. 1973. Mailed notice to defts Zane 2 Laurel St. Jericho, N.Y. and Silverman 14 E. 82nd St. N.Y.C. and to the U.S. Atty.
9-25-73	ROBERT S. PERSKY-Filed reply memorandum in support of deft's motion to dismiss cts. 4 and 5.
9-26-73	Defts. ZANE, SILVERMAN, FISCHER & PERSKY- Filed transcript of proceedings, dated May 8, 1973.
4-3-73	Filed Motion by Deft. C.J. Fischer for Discovery & Inspection
4-30-73	Filed Brief of the Deft, Fischer, in support of his motion for Discovery
5-25-73	Filed Judgment & Comm of Morton S. Kaplan,
May 30, 73	Filed Order of Judge Wyatt releasing Deft Morton S. Kaplan on his on recognizance.
6-8-73	Filed Deft. R. Persky's specific exception to Govt's Supplemental request to Charge.
6-8-73	Filed Supplemental requests to charge of Deft. Zne & Silverman.
6-8-73	Filed Deft. R. S. Persky's Supplemental Requests to Charge
6-8-73	Filed Govt's Memo of Law on requirement of Public Cos. to file form 10-K.
6-8-73	Filed Govt's Requests to Charge

DATE	PROCEEDINGS
6-18-73	Filed Transcript of proceeding dated April 10, 73
7-3-73	Filed Financial Affidavit CJA 23, for Ramon D'Onofrio
Sept 6, 73	Filed Unsecured Personal Rec. Bond Pending Appeal for R. S. Persky.
Sept 6, 73	Filed PRB for Philip Zane. unsecured.
Sept 6, 73	Filed PRB, unsecured, for J. E. Silverman
Sept 20, 73	Filed Reply Memo. of Deft. R.S. Persky in support of his motion to dismiss Counts 4 & 5.
Sept 26, 73	Filed Transcript of proceedings dated May 8, 73
Oct 3, 73	Filed Answer of the Govt. (copy)
Oct 3, 73	Filed Transcript of Proceeding dated May 7, 73.
Oct 3, 73	Filed Transcript of proceedings dated May 2, 73.
Oct 3, 73	Filed Notice of Motion of John Logan O'Donnell.
Oct 4, 73	Filed transcript of record of proceedings, dated MAY 8, 73.
"	Filed transcript of record of proceedings, dated MAY 16, 17, 73.
"	Filed transcript of record of proceedings, dated MAY 21, 73
"	Filed transcript of record of proceedings, dated MAY 22, 73
"	Filed transcript of record of proceedings, dated MAY 23, 24, 25, 73.
"	Filed transcript of record of proceedings, dated MAY 30, 73.
"	Filed transcript of record of proceedings, dated JUN 4, 5, 6, 7, 73.
"	Filed transcript of record of proceedings, dated JUN 8, 9, 11, 13 & SEPT 6, 1973
10-4-73	Filed stipulation designating exhibits.
10-4-73	JEROME E. SILVERMAN, PHILIP ZANE, & ROBERT S. PERSKY = filed notice that the entitled proceedings has been certified and transmitted to the U.S. Court of Appeals for the 2nd Circuit this 4th day of October, 1973.
10-26-73	Filed transcript of record of proceedings dated: MARCH 19, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 7, 1973
10-26-73	Filed transcript of record of proceedings dated: MAY 7, 1973
10-26-73	Filed transcript of record of proceedings dated: MAY 9, 10, 11, 1973
10-26-73	Filed transcript of record of proceedings dated: MAY 14, 15, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 15, 16, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 17, 18, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 18, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 25, 1973.
10-26-73	Filed transcript of record of proceedings dated: MAY 31, 1973.
10-26-73	Filed transcript of record of proceedings dated: SEPTEMBER 6, 1973
10-31-73	Filed plttf's Stipulation that all exhibits in this ACTION BE transmitted to the Cou Appeals as part of the record on appeal.
10-31-73	Filed Notice -- The Supplemental record on appeal has this day been certified and transmitted to the U.S.C.A. 2nd Circuit.
11-20-73	Filed transcript of record of proceedings dated: MAY 7-73
11-21-73	PHILIP ZANE, JEROME SILVERMAN, CHARLES WISLER and ROBERT PERSKY- Filed notice that the Supplemental record on appeal in the above entitled proceeding has been certified and transmitted to the U.S. Court of Appeals for the 2nd Circuit this 21st day Nov, 73.
12-20-73	Filed transcript of record of proceedings dated: APR. 24-73
12-20-73	MORTON S. KAPLAN- Filed Notice-The Supplement record on appeal in this proceeding has been certified and transmitted to the U.S. Court of Appeals for the Second Circuit.

PROCEEDINGS

DATE

4-11-74	ROBERT S. PERSKY - Filed Notice of Motion for a new Trial and Memorandum in support of Deft's motion for a new Trial.
4-11-74	PHILIP ZANE & JEROME SILVERMAN - Filed Notice of Motion for a New Trial and Memorandum in support of Deft's Motion for a New Trial.
4-22-74	ROBERT S. PERSKY - Filed Supplemental Affidavit & Transcript of Yamada Guilty Plea.
4-22-74	ROBERT S. PERSKY - Filed Supplemental Affidavit & Transcript of Yamada Guilty Plea.
4-24-74	Filed Government's Memorandum of Law in opposition to defts. motion for a new trial.
4-24-74	Filed Gov't. Affidavit in opposition to motions of defts. Philip Zane, Jerome Silverman & Robert S. Persky for an order granting a new trial.
4-26-74	PHILIP ZANE & JEROME SILVERMAN - Filed deit's Reply Memorandum of Law, in reply to Plt.f's opposition granting a new trial.
A-26-74	PHILIP ZANE & JEROME SILVERMAN - Filed Memo. End. on motion dated 4/11/74. For the reasons stated in open court this date the within motion is denied. So Ordered Wyatt J. (mailed notice)
4-26-74	ROBERT S. PERSKY - Filed Memo. End. on motion dated 4/11/74. For the reasons stated in open court this date the within motion is denied. So Ordered. Wyatt J. (mailed notice)
4-29-74	ROBERT S. PERSKY - Filed Reply Memorandum in support of Deft. Robert S. Persky's motion for a new trial.
5-6-74	ROBERT S. PERSKY - Filed Notice of Appeal from order denying new trial on 4/26/74. (mailed notice to Deft. and U.S. Atty's office)
5-6-74	JEROME SILVERMAN & PHILIP ZANE - Filed Notice of Appeal from order denying a new trial on 4/26/74. (mailed notice to deft. and U.S. Atty's office)
5-10-74	Pre Trial Conference held. Trial Oct. 15, 1974. 9:30 a.m. Wyatt J.
5-14-74	Filed Transcript of Trial held Apr. 25, 1974.
5-17-74	Certified Supplemental Record to the USCA.
5-17-74	Filed letter to Judge Wyatt from Sandor Frankel dtd: 4-18-74.
6-17-74	PHILIP ZANE - Certified Supplemental Record to the USCA.
11-6-74	PHILIP ZANE & JEROME SILVERMAN - Filed a copy of U.S. Supreme Court mandate. The petition for writ of certiorari is denied. (mailed notice)
11-6-74	ROBERT S. PERSKY - Filed a copy of U.S. Supreme Court mandate. The petition for a writ of certiorari is denied. (mailed notice)

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DATE	PROCEEDINGS	# 74,322
11-8-74	RAMON N. D'ONOFRIO-Filed ORDER and ORDER OF PROBATION (Att'y present) It is adjudged that the deft. is FINE \$10,000.00 on count 1. TOTAL FINE of \$10,000.00 is to be paid during deft's period of probation imposed on 72 Cr. 1221 and 73 Cr. 554 at such times and in such installments as the U.S. Probation Officer shall direct. Deft. is not to be committed for non payment of fine....Briemant, J. Issued copies 11-8-74.	
11-8-74	RAMON N. D'ONOFRIO-Filed ORDER deft. to surrender himself to the Attorney General by reporting to Eglin Air Force Base, Florida, at 10:00 A.M. on 11-12-74.....Briemant, J.-consented to. (Filed in 72Cr.884CLB)	
11-12-74	PHILIP ZANE, JEROME E. SILVERMAN & ROBERT S. PERSKY-Filed true copy of U.S.C.A. Mandate, with opinion attached. The judgment of the District Court is affirmed. Judgment Entered 11-13-74--Clerk. (mailed notice)	
11-20-74	CHARLES FISCHER-Filed Stip. & Order substituting Roger M. Rosenberg as deft's attorney.....Wyatt, J.	
11-25-74	ROBERT S. PERSKY-Filed letter from Olwine, Connelly, Chase, O'Donnell & Weyher by John Logan O'Donnell to Judge Wyatt dated 11-23-74, in reference to deft's bail status.	
11-25-74	Pre-trial conference held. Govt. moves to dismiss U.S. Secretarial Institute. Granted. Trial Jan.13,1975 9:30 A.M.....Wyatt, J.	
11-27-74	JEROME E. SILVERMAN & PHILIP ZANE-Filed defts. affidavit & notice of motion for reduction of sentence.	
12-19-74	JEROME E. SILVERMAN-Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 12-4-74.	
12-19-74	ROBERT S. PERSKY-Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 12-4-74.	
12-27-74	ROBERT S. PERSKY-Filed commitment & entered return. Deft. delivered to Federal Prison Camp, Allenwood, Pa. on 12-13-74.	
12-31-74	ROBERT S. PERSKY-Filed deft's. affidavit & notice of motion to adjourn trial.	
12-31-74	ROBERT S. PERSKY-Filed deft's. affidavit & notice of motion for reduction of sentence.	
12-31-74	ROBERT S. PERSKY-Filed affidavit & notice of motion of Olwine, Connelly, Chase, O'Donnell & Weyher for an Order granting leave to withdraw as attorneys of record for deft. and for an Order allowing Robert S. Persky to appear in this proceeding on his own behalf.	
1-7-75	Filed transcript of record of proceedings dated 11-25-75.	
1-7-75	Filed transcript of record of proceedings dated 11-29-75.	
1-7-75	ROBERT S. PERSKY-Filed MEMO ENDORSED on deft's. motion to adjourn trial filed 12-31-74 After hearing in open Court, this motion is denied. SO ORDERED.....Wyatt, J. (mm)	
Cont'd. on Page #11		

110 Rev. Civil Docket Continued

DATE	PROCEEDINGS	Date Order Judgment No.
-7-75	ROBERT S. PERSKY-Filed MEMO ENDORSED on deft's. motion for reduction of sentence filed 12-31-74. After hearing in open Court this motion is denied, SO ORDERED.Wyatt,J. (mn)	
-7-75	ROBERT S. PERSKY-Filed ORDER that deft's. motion for an order dismissing counts 4 & 5 for failure to charge an offense is denied without prejudice as per memorandum to counsel dated May 6, 1974. SO ORDERED.....Wyatt,J. (mn)	
-8-75	ROBERT S. PERSKY-Filed MEMO ENDORSED on motion of Olwine, Connelly, Chase, O'Donnell & Weyher for an Order granting leave to withdraw as attorneys of record for deft. and for an Order allowing Robert S. Persky to appear in this proceeding on his own behalf. Motion granted. SO ORDERED....Wyatt,J. (mn)	
1-7-75	Pre-trial conference held.....Wyatt,J.	
1-8-75	Pre-trial conference held.....Wyatt,J.	
1-10-75	ROBERT S. PERSKY-Filed Govt's. proposed examination of prospective jurors.	
1-13-75	PHILIP ZANE-Filed Stip. & ORDER that Counts 8 & 12 presently pending, be placed on the Suspense Calendar of this Court until the U.S. Supreme Court hears & determines deft's. petition for a writ of certiorari. If said petition is denied, Counts 8 and 12 shall be restored to the trial calendar of this Court whereupon the U.S.A. shall move promptly to dismiss those counts; and if said petition is granted and the judgment of conviction is reversed & remanded for a new trial, Counts 8 & 12 shall be restored to the trial calendar of this Court and consolidated with Count 2, for retrial against deft. SO ORDERED.Wyatt,J.	
1-7-75	ROBERT S. PERSKY-Filed Govt's. affidavit for a writ of habeas corpus directed to Warden, Federal Detention Headquarters, N.Y.C. Writ issued, ret. 1-8-75.	
1-7-75	ROBERT S. PERSKY-Filed Govt's. affidavit for a writ of habeas corpus for Ramon N. D'Onofrio, directed to Superintendent, Federal Prison Camp, Eglin Air Force Base, Florida. Writ issued, ret. 1-9-75.	
1-6-75	PHILIP ZANE, JEROME E. SILVERMAN & ROBERT S. PERSKY-Filed true copy of U.S.C.A. mandate with opinion attached. The Orders of the District Court are hereby affirmed. Judgment Entered 1-10-75-Clerk. (mailed notice)	
1-13-75	Second trial begun as to deft. Robert Persky on counts 4 and 5.	
1-14-75	Trial continued.	
1-15-75	Trial continued.	
1-16-75	Trial continued.	
1-17-75	Trial continued.	
1-22-75	ROBERT S. PERSKY-Filed Govt's. memorandum of law relating to Count 5.	
1-20-75	Trial continued. Govt. rests. Deft. moves for a directed verdict of acquittal as to counts 4 & 5. Court grants deft's. motion as to count 5, and denied as to count 4. Court directs a Judgment of acquittal as to count 5.	
1-21-75	Trial continued. Both sides rest.	
1-22-75	Trial continued. Summations & Charge. Jury deliberating.	
1-23-75	Trial continued. Jury deliberations continued. Jury finds the deft. Robert S. Persky Guilty on count 4.....Wyatt,J.	

PROCEEDINGS

Date Order or
Judgment Note

- 75 ROBERT S. PERSKY-Filed JUDGMENT and COMMITMENT-The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, on count 4, pursuant to Title 18, Section 3651, U.S. Code, on condition the deft. be confined in a jail or treatment type institution for THREE (3) MONTHS, the remainder of the sentence of imprisonment is suspended, and the deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court. Sentence of imprisonment is to run concurrently with sentence imposed on count 2, September 6, 1973.
.....Wyatt, J.
Issued commitment 1-23-75
- 75 ROBERT S. PERSKY-Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 1-23-75.
- 75 JEROME E. SILVERMAN & PHILIP ZANE-Filed MEMO ENDORSED on deft's. motion filed 11-27-74. This motion was denied in open Court on 11-29-74 except to the extent of permitting surrender at separate times, as shown by the stenographic minutes. SO ORDERED.....Wyatt, J. (mailed notice)
- 75 JEROME E. SILVERMAN-Filed deft's. pro se motion for reduction of sentence.
- 75 JEROME E. SILVERMAN-Filed MEMO ENDORSED on deft's. motion filed 2-19-75. This "petition" by deft. Silverman is treated as a second motion to reduce sentence (Fed. R. Crim. P. 35) and is denied. SO ORDERED.....Wyatt, J. (notice mailed by Pro Se)
- 3 ROBERT S. PERSKY-Filed deft's. (pro se) notice of motion pursuant to Rules 12.29, 33 & 34 F.R.Cr.P. for dismissal of count 4 of the indictment, a directed verdict of acquittal, a new trial & an order of arrest of judgment, ret. 2-28-75.
- 75 ROBERT S. PERSKY-Filed deft's. (pro se) memorandum in support of motion under rules 12,29,33 & 34 F.R.Cr.P.
- 75 ROBERT S. PERSKY-Filed deft's. amended memorandum in support of motion under rules 12,29,33 & 34 F.R.Cr.P.
- 75 ROBERT S. PERSKY-Filed Govt's. memorandum of law in opposition to deft's. post-trial motion to vacate his conviction.
- 75 ROBERT S. PERSKY - Filed Memo. end. on defts. motion filed 2/21/75. The within motion is denied. So Ordered Wyatt J. (notice mailed to Pro Se)
- 75 ROBERT S. PERSKY-Filed deft's. notice of appeal from the Judgment of Conviction entered on 1-23-75 & denial of motion on 2-28-75. Mailed notice to Robert S. Persky, One Rockefeller Plaza, N.Y.C. & U.S. Attorney's Office.
- 75 ROBERT PERSKY-Filed notice of certification & transmittal of the supplemental record on appeal to the U.S.C.A.
- 75 ROBERT S. PERSKY-Filed Govt's. designation of additional parts of transcript to be included in the record on appeal.

INDICTMENT-COUNTS FOUR AND FIVE

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72-2496

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-v-

MORTON S. KAPLAN,
PHILIP ZANE,
JEROME E. SILVERMAN,
CHARLES J. FISCHER,
ROBERT S. PERSKY,
RAMON N. D'ONOFRIO, and
U.S. SECRETARIAL INSTITUTE, LTD.,

Defendants.

INDICTMENT

73 Cr. 192

-----X
INTRODUCTION

The Grand Jury charges:

1. From on or about July 1, 1969, up to and including March 1, 1971, MORTON S. KAPLAN, the defendant, was President, a director, and majority shareholder of Microthermal Applications, Inc. ("Microthermal"), a corporation incorporated under the laws of the State of Delaware in June 1968, whose fiscal year for 1969 ended January 31, 1970.

INDICTMENT-COUNTS FOUR AND FIVE

2. From on or about July 1, 1969, up to and including the date of this indictment, CHARLES J. FISCHER, the defendant, was employed in the banking and financing business in the States of New York and New Jersey and among other things, specialized in the purchase and sale of certificates of deposit and other instruments of credit on behalf of clients.

3. From on or about July 1, 1969, up to and including March 31, 1971, ROBERT S. PERSKY, the defendant, was an attorney and member of the Bar of the State of New York. During that period of time, ROBERT S. PERSKY, the defendant, was a shareholder and Secretary of, and a member of the law firm acting as General Counsel to, Microthermal.

4. From on or about July 1, 1969, up to and including the date of this indictment, PHILIP ZANE, the defendant, was a certified public accountant and a member of the firm of Zane and Silverman, certified public accountants in the State of New York, which prepared and certified Microthermal's financial statements for its fiscal year ending January 31, 1970.

5. From on or about July 1, 1969, up to and including the date of this indictment, JEROME E. SILVERMAN, the defendant, was a certified public accountant and a member of the firm of

INDICTMENT-COUNTS FOUR AND FIVE

Zane and Silverman, certified public accountants in the State of New York, which prepared and certified Microthermal's financial statements for its fiscal year ending January 31, 1970.

6. From on or about October 24, 1969, up to and including the date of this indictment, RAMON N. D'ONOFRIO, the defendant, was a director and controlling shareholder of U.S. SECRETARIAL INSTITUTE, LTD. ("U.S. SECRETARIAL"), the defendant, a corporation incorporated under the laws of the State of Delaware, and from time to time during that period, a partner in the investment and promotion firm of D'Onofrio, Faeney, & Kirschbaum, New York, New York.

7. From on or about July 1, 1969, up to and including May 31, 1971, Akiyoshi Yamada, named herein as a co-conspirator and not as a defendant, was a general partner of Takara Partners, a limited partnership and hedge fund in the State of New York.

8. From on or about October 1, 1969, up to and including October 1, 1970, John Peter Galanis, named herein as a co-conspirator and not as a defendant, but named in Information 73 Cr. 52 as a defendant, was a general partner of Takara Partners, a limited partnership and hedge fund in the State of New York.

INDICTMENT-COUNTS FOUR AND FIVE

9. From on or about July 1, 1969, up to and including December 31, 1970, Steven C. Burns, named herein as a co-conspirator and not as a defendant, but named in Information 72 Cr. 1207 as a defendant, was a trader and security salesman at Arnold Wilkins & Co., a broker-dealer then registered with the United States Securities and Exchange Commission (the Commission).

10. From on or about January 1, 1970, up to and including December 31, 1970, Richard Kirschbaum, named herein as a co-conspirator and not as a defendant, was a partner in an investment firm with RAMON N. D'ONOFRIO, and an officer of U.S. SECRETARIAL.

11. In a public offering of 200,000 of its Class A Common Shares in July 1969, Microthermal raised approximately \$800,000, of which approximately \$150,000 was to be expended in furtherance of the public offering and other expenses. According to the prospectus for the public offering, which was filed with the Commission, of the remaining approximately \$650,000, approximately \$307,500 was to be allocated to Microthermal's general fund for temporary investment in Certificates of Deposit, Government Securities, or such other interest bearing obligations as management deemed appropriate.

12. In October 1969, MORTON S. KAPLAN transferred \$240,000 of Microthermal's moneys raised from the public offering to John P. Galanis, Akiyoshi Yamada, and Takara Partners. MORTON S. KAPLAN, ROBERT S. PERSKY, Akiyoshi Yamada, and John P. Galanis drew up papers disguising the transaction as a short-term purchase of securities of Delanair Corp. by Microthermal, which securities had previously been purchased for investment purposes for the portfolio of Takara Partners. These papers also provided for a guaranteed re-purchase of the Delanair securities by Takara Partners within a designated period of time.

13. In January 1970, MORTON S. KAPLAN caused Microthermal's bank in Florida to wire \$240,000 of Microthermal's moneys raised from the public offering to Takara Partners.

14. By January 31, 1970, MORTON S. KAPLAN had sent or caused to be sent to Takara Partners, and Takara Partners had received, \$480,000 of Microthermal's moneys raised from the public offering. None of these moneys had been invested in certificates of deposit, government securities, or other cash or highly liquid items by Akiyoshi Yamada, John P. Galanis, or any other representative of Takara Partners.

INDICTMENT-COUNTS FOUR AND FIVE

COUNT FOUR

The Grand Jury further charges:

1. From on or about July 1, 1970, up to and including March 31, 1971, in the Southern District of New York MORTON S. KAPLAN, ROBERT S. PERSKY, RAMON N. D'ONOFRIO, and U. S. SECRETARIAL, the defendants, along with Akiyoshi Yamada and John P. Galanis and other persons to the Grand Jury known and unknown, unlawfully, wilfully, and knowingly in the purchase and sale of securities, to wit, shares of common stock of Microthermal, by the use of the means and instrumentalities of transportation and communication in interstate commerce and by the use of the mails, did directly and indirectly (a) employ devices, schemes, and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices, and courses of business which operated and would operate as a fraud and deceit upon the purchasers and sellers of the aforementioned securities.

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72-2496

2. Among the means by which the defendants and others would and did effectuate the fraudulent scheme, as described in paragraph 1, supra, were the following:

(a) In July 1970, MORTON S. KAPLAN, ROBERT S. PERSKY, and John P. Galanis had merger discussions on behalf of Microthermal with Meridian Capital Corporation (Meridian).

(b) In August 1970, MORTON S. KAPLAN, ROBERT S. PERSKY, and John P. Galanis signed an agreement with Meridian whereby Microthermal would, among other things, issue some of its securities in exchange for substantially all of the assets of Meridian. The effect of the merger was to be that Meridian which was in dire financial straits, would acquire purportedly substantial liquid assets in the amount of \$375,000 in certificates of deposit of Microthermal.

(c) In October 1970, ROBERT S. PERSKY and MORTON S. KAPLAN caused a Notice of Special Meeting to be mailed to shareholders of Microthermal, and such a meeting to ratify the agreement described above was held at 477 Madison Avenue.

INDICTMENT-COUNTS FOUR AND FIVE

(d) In October 1970, principals of Meridian learned of Microthermal's true financial position, to wit, Microthermal did not have the substantial liquid assets as represented in the agreement signed in August 1970. In mid-October 1970, principals of Meridian indicated a desire to terminate the agreement and ROBERT S. PERSKY on behalf of Microthermal withdrew from the agreement.

(e) In November 1970, ROBERT S. PERSKY, MORTON S. KAPLAN, John P. Galanis, and others had merger discussions on behalf of Microthermal with RAMON N. D'ONOFRIO and others on behalf of U. S. SECRETARIAL.

(f) In November 1970, ROBERT S. PERSKY, MORTON S. KAPLAN, RAMON N. D'ONOFRIO and others reached an agreement whereby Microthermal would, among other things, purchase a minority portion of the common stock of U. S. SECRETARIAL for the purportedly substantial liquid assets of Microthermal in the amount of \$375,000 in certificates of deposit, when in truth and in fact, as ROBERT S. PERSKY, MORTON S. KAPLAN, and RAMON N. D'ONOFRIO well knew, Microthermal did not have such assets.

INDICTMENT-COUNTS FOUR AND FIVE

(g) To induce RAMON N. D'ONOFRIO to enter into the agreement, MORTON S. KAPLAN and John P. Galanis agreed to pay RAMON N. D'ONOFRIO a sum of money and John P. Galanis caused RAMON N. D'ONOFRIO to be paid \$50,000.

(h) On November 20, 1970, Akiyoshi Yamada was requested by ROBERT S. PERSKY to sign a delivery receipt on behalf of Takara Partners, acknowledging delivery of the \$375,000 of certificates of deposit purportedly held by Takara Partners to U. S. SECRETARIAL, when in truth and in fact, as ROBERT S. PERSKY and Akiyoshi Yamada well knew, no such certificates of deposit were in existence. Thereafter, ROBERT S. PERSKY, Akiyoshi Yamada and others agreed that Yamada, on behalf of Takara Partners, would acknowledge receipt of "instructions" to deliver \$375,000 in certificates of deposit to U. S. SECRETARIAL. Pursuant to such agreement, a representative of U. S. SECRETARIAL received delivery of an envelope which purportedly contained the certificates of deposit when in truth and in fact as RAMON N. D'ONOFRIO well knew the envelope was empty.

INDICTMENT-COUNTS FOUR AND FIVE

(i) By February 26, 1971, MORTON S. KAPLAN and ROBERT S. PERSKY had stripped Microthermal of substantially all of its assets with the exception of the U. S. SECRETARIAL'S securities by transferring its real assets to a private corporation controlled by MORTON S. KAPLAN. On or about that date, after the Commission's investigation more fully described in paragraph 1 of Count Three had commenced, Microthermal was caused by ROBERT S. PERSKY and MORTON S. KAPLAN to issue its securities for the securities of Continental Engineering and Development, Inc. (Continental) which wished to have control of a public shell corporation. The effect of this deal was to transfer control of Microthermal to the principals of Continental.

(Title 15, United States Code, Sections 78j(b) and 78ff and Rule 10b-5, (17 C.F.R. §240.10b-5); Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

From on or about November 20, 1970, up to and including March 31, 1971, in the Southern District of

INDICTMENT-COUNTS FOUR AND FIVE

New York and elsewhere, MORTON S. KAPLAN and ROBERT S. PERSKY, the defendants, unlawfully, wilfully and knowingly failed and omitted to file with the Commission, on behalf of Microthermal, a current report on Form 8-K for the month of November 1970, for the purpose of reporting, among other things, the purchase by Microthermal of the common stock of U. S. SECRETARIAL, as required by Title 15, United States Code, Sections 78o and 78ff and Rule 15d-11 (17 CFR §240.15d-11).

(Title 15, United States Code, Sections 78o and 78ff; Rule 15d-11 (17 CFR 240.15d-11); Title 18, United States Code, Section 2).

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

1. In relationship to Paragraph 12 of the Introduction to the Indictment, state the nature of the papers allegedly drawn up by Robert S. Persky "disguising" the transaction as a short-term purchase of the securities of Delanaire Corporation by Microthermal, identifying such papers by date, caption and signatories;

1. See exhibit 1.

2. State whether the contention of the United States is that Robert S. Persky knew in October 1969 that the papers were "disguising" the transaction described in Paragraph 12 of the Introduction to the Indictment;

2. The United States contends that Robert S. Persky knew that the papers annexed as exhibit 1 disguised the true and intended nature of the transaction.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

3. With regard to Paragraph 1 of COUNT ONE,
set forth the names of the other persons to the Grand Jury
known who allegedly combined, conspired, confederated
and agreed to commit offenses and violate laws of the
United States;

3. No others now known to the United States.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

4. In relationship to Paragraph 3(b) of COUNT ONE, (i) set forth the date or dates in April of 1970 on which Robert S. Persky allegedly discharged the accounting firm of Arthur Andersen & Co., (ii) set forth the names of the individuals at Arthur Andersen & Co., allegedly contacted by Robert S. Persky, (iii) set forth whether the alleged contact was oral or by writing, (iv) if said contact is alleged to be in writing, identify the writing by date, caption and signatories; and (v) if said contact is alleged to be oral, set forth the substance of the conversation;

4. (i) The date on which Robert S. Persky and Morton S. Kaplan discharged the accounting firm of Arthur Andersen & Co. is April 14, 1970.

(ii) not known at this time

(iii) both

(iv) see exhibit 2

(v) not known at this time

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

5. With regard to Paragraph 3(b) of COUNT ONE, set forth the manner and the capacity in which Robert S. Persky allegedly hired Philip Zane and Jerome E. Silverman;

5. John P. Galanis was asked by Robert S. Persky and Morton S. Kaplan to recommend new accountants for Microthermal; Galanis contacted Steven Burns, who gave Galanis the names of Philip Zane and Jerome E. Silverman. Galanis gave the names to Persky and Kaplan and, at Galanis' recommendation, Persky and Kaplan met with the accounting firm and subsequently hired Zane and Silverman.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

6. With regard to Paragraph 3(d) of COUNT ONE, (i) set forth the dates in April 1970 and the times of day at which Morton S. Kaplan, Robert S. Persky, Jerome E. Silverman, Philip Zane, Akiyoshi Yamada and John P. Galanis allegedly held meetings at 477 Madison Avenue, and (ii) set forth the names of the other persons allegedly attending such meetings;

6(i). April 1, 1970; April 14, 1970; April 15, 1970; April 16, 1970; April 17, 1970; and other dates to be specified by the Government on a supplemental bill of particulars.

(ii) Kaplan, Persky, Silverman, Zane, Yamada, Galanis, Burns.

7. State whether the United States contends that Robert S. Persky knew at any time during April, May, June or July of the events described in Paragraphs 3(e) and 3(f)(i), (ii), (iii), (iv), and (v) of COUNT ONE;

7. The United States contends Persky knew of the telephone call by Yamada to Kirschbaum, as described in 3(e), and did not know of the events described in 3(f)(i) - (v) in detail but did know that Galanis, Yamada and others were engaged in an effort to secure evidence of a certificate of deposit.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

8. With regard to Paragraph 3(g) of COUNT ONE, (i) set forth whether the "advice" given Robert S. Persky was in writing or oral, (ii) if the advice is alleged to be in writing, set forth the date and nature of the written instrument, (iii) if the advice is alleged to be oral, set forth the name of the person who advised Robert S. Persky, (iv) set forth whether the alleged direction to an agent of The Bank of New York from Robert S. Persky was oral or in writing, (v) if the alleged direction was in writing, set forth the date of the writing and the substance thereof; and (vi) if the alleged direction was oral, set forth the substance of the conversation and the date thereof and indicate the person or persons at The Bank of New York allegedly spoken to be Robert S. Persky;

8. (i). Both oral and written

(ii). Letter of May 18, 1970, from Katherine Plott to Bank of New York; copy of letter of May 14, 1970, from Franklin National Bank to Morton S. Kaplan.

(iii) Morton S. Kaplan and Katherine Plott.

(iv) Oral

(v) Not applicable

(vi) Persky spoke by telephone with Gilbert Losurdo; on or about May 27, 1970; Persky requested delivery of the certificate of deposit to him and Losurdo told Persky the bank had no certificate of deposit for Microthermal.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

9. With regard to Paragraph 3(h) of COUNT ONE, (i) set forth the date in May of 1970 in which the alleged meeting was attended by Robert S. Persky; (ii) set forth the names of the "others" allegedly attending the meeting; (iii) state whether the United States contends that Robert S. Persky was present when the alleged fee of approximately \$5,000.00 of unlawful compensation and other financial inducements by John Galanis, Steve C. Burns and Akiyoshi Yamada was promised to Jerome E. Silverman and Philip Zane; and (iv) state whether the United States contends that Robert S. Persky was aware of this alleged unlawful compensation in the months of May through November of 1970;

9(i) From on or about May 14, 1970, up to and including May 27, 1970.

(ii) Joseph Rozzo and possibly others.

(iii) Persky was physically present at 777 Madison Avenue, but the Government does not contend that Persky physically heard the promises made to Zane and Silverman.

(iv) No.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

10. With regard to Paragraph 3(i) of COUNT ONE, (i) state who gave Robert S. Persky's name to Franklin National Bank and (ii) state whether the United States contends that Robert S. Persky knew that his name was being used;

10(1) Not presently known to the Government.

(11) yes.

11. With regard to Paragraph 3(m) of COUNT ONE, state the nature and amount of the alleged compensation paid to Charles J. Fischer and Richard Kirschbaum;

11. The Government objects to this request, but does state that Persky did not know that compensation was to be paid, who paid it, how much was to be paid, or what form it was to be paid.

12. In relationship to the overt acts alleged in COUNT ONE, state which paragraphs of COUNT ONE relate to subparagraphs (a) and (b) under the caption "Overt Acts";

12. Overt act (a) relates to paragraph 3(d), 3(g), and 3(h).

Overt act (b) relates to paragraph 3(g).

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

13. With regard to COUNT TWO, set forth which material facts, if any, other than those relating to the alleged missing \$500,000.00 certificate of deposit, were omitted from the Form 10-K;

13. At this time, the Government intends to prove only the facts relating to the \$500,000.00 certificate of deposit.

14. With regard to Paragraph 1 of COUNT FOUR, set forth the names of the other persons to the Grand Jury "known";

14. Glenn Woo; Scott Barter; Richard Kirschbaum; Martin Gibbs; and others to be named in a supplemental bill of particulars.

15. With regard to Paragraph 1 of COUNT FOUR, set forth to whom and from whom shares of common stock of Microthermal Applications, Inc., were sold and/or by whom purchased;

15. The Government will produce records from Microthermal's transfer agent as soon as they are available to the Government.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

16. With regard to Paragraph 2(a) of COUNT FOUR, state (i) with whom Robert S. Persky allegedly had merger discussions with Meridian Capital Corporation; (ii) when in July 1970 Robert S. Persky allegedly had merger discussions with Meridian Capital Corporation and (iii) the time and place of such discussions;

16(1) Randall Reis, Robert Hagopian, and two attorneys for Meridian, Elliot Gerson and George Link.

(ii) On or about July 10, 1970.

(iii) 577 Madison Avenue.

17. With regard to Paragraph 2(d) of COUNT FOUR, (i) set forth the names of the principals of Meridian who learned in October 1970 of Microthermal's financial position and (ii) set forth the manner in which such principals learned of Microthermal's financial position;

17(1) Randall Reis and Robert Hagopian

(ii) informed by Galanis by telephone; thereafter, they communicated with Persky.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

18. With regard to Paragraph 2(e) of COUNT FOUR, state (i) with whom Robert S. Persky allegedly had merger discussions relating to Microthermal Applications, Inc., and U.S. Secretarial Institute, Inc., (ii) when in November 1970 Robert S. Persky allegedly had such discussions and (iii) the time and place of such discussions;

18(i) Patrick Barton, Ramon H. D'Onofrio,
John Galanis, Morton S. Kaplan
(ii) Throughout month of November
(iii) 477 Madison Avenue

19. With regard to Paragraph 2(f) of COUNT FOUR, set forth the time, place and names of the "others" who allegedly attended a meeting in November of 1970 reaching an agreement on the purchase of the stock of U.S. Secretarial;

19. November 20, 1970; Patrick Barton, Scott Barter, Martin Gibbs, John Galanis, Akiyoshi Yamada, Ira Smith; late afternoon; 477 Madison Avenue.

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

20. With regard to COUNTS ONE, TWO, FOUR and FIVE, state whether the United States contends that Robert S. Persky received any unlawful compensation and, if so, describe such compensation and set forth the time and place and person or persons who paid such unlawful compensation.

20. The Government does not allege any compensation other than fees for professional services and stock purchases and sales.

Microthermal Applications, Inc.
Sheraton-Four Ambassadors
Tower I - Suite 1810
801 South Bayshore Drive
Miami, Florida

October 1, 1969

Takara Partners
342 Madison Avenue
New York, New York 10017

Dear Sirs:

The undersigned hereby offers to purchase 80,000 shares of the Common Stock of Delanair, Inc., par value \$.01 each, ("Shares") for the sum of \$240,000.00. The undersigned agrees that the closing of this transaction shall take place at such location and on such date as we may mutually agree but in any event prior to October 3, 1969. At the closing the undersigned will deliver the purchase price and you shall deliver to the undersigned certificates evidencing such shares appropriately endorsed for transfer with the signature guaranteed and any requisite stock transfer stamps affixed.

The undersigned warrants and represents that the Shares to be so acquired will be acquired for investment and not with a view to or for resale in connection with any distribution (within the meaning of the Securities Act of 1933, as amended) of any of such shares.

The stock certificates representing such shares to be purchased by the undersigned shall contain the following legend:

Exhibit 1 to Bill of Particulars

COMPOSITE OF DEMAND FOR BILL OF
PARTICULARS AND ANSWER OF U.S. ATTORNEY

"The shares represented by this certificate have not been registered under the Securities Act of 1933. They may not be sold or transferred in the absence of an effective registration statement for the shares under the Securities Act of 1933, or an opinion of counsel for the Corporation that registration is not required under said Act."

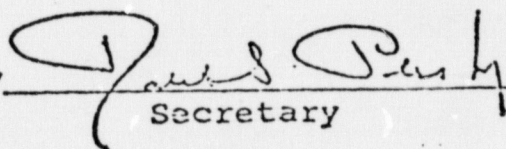
In consideration of our agreement to purchase the Shares you agree that you will at our option repurchase the Shares for an aggregate of \$253,000 at any time within eighty-one (81) days from the date hereof.

- 1) The repurchase price of the Shares shall be reduced by the value of any cash dividend on the day the stock goes ex dividend.
- 2) In the event of stock splits, reverse splits or other similar action by above mentioned corporation, our option to require repurchase shall become an option for the equivalent in new securities and the repurchase price shall not be reduced.

Please indicate your acceptance of this offer by signing the enclosed copy of this letter and returning it to the undersigned.

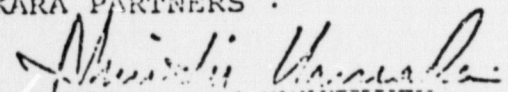
Very truly yours;

MICROTHERMAL APPLICATIONS, INC.

By 
Secretary

ACCEPTED AND AGREED TO:

TAKARA PARTNERS

By 
Akiyo Hamaoka
General Partner

ROBERT S. PERSKY

DOCKET NO.

73 Cr. 192 I.B.W.

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH

DAY

YEAR

1

23

75

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

ROBERT S. PERSKY, ESQ. PRO-SE
(Name of counsel)

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

There being a ~~guilty~~ verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly in the purchase and sale of securities, by the use of the means and instrumentalities and communication in interstate commerce and by use of the mails, did employ devices schemes, and artifices to defraud.
(Title 15, U.S.Code, Sections 78j(b) and 78ff
Title 18, U.S.Code, Section 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS, on count 4, pursuant to Title 18, Section 3651, U.S. Code, on condition the defendant be confined in a jail or treatment type institution for THREE (3) MONTHS, the remainder of the sentence of imprisonment is suspended, and the defendant is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court.

Sentence of imprisonment is to run concurrently with sentence imposed on count 2, September 6, 1973.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

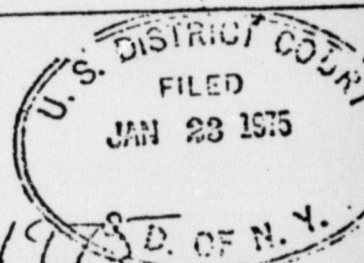
MICROFILM

JAN 27 1975

INZER B. WYATT, D.J.

Date

Jan 23, 1975



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ONLY COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED:
U.S. DC.
March 16-75
SDNY

-----X
: United States of America :
:

v. :

Robert S. Persky :
-----X

73 Cr. 192 1BW


NOTICE OF APPEAL

Notice is hereby given that Robert S. Persky, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered in this action on the 23rd day of January, 1975 and the motions with respect thereto denied on the 28th day of February, 1975 in the United States District Court for the Southern District of New York (Honorable Inzer B. Wyatt).

March 6, 1975

PERSKY & JARBLUM, P.C.

By


A Member of the Firm
One Rockefeller Plaza
New York, New York 10020

TO: Clerk of District Court
Southern District of
New York
New York, New York



WILLIAM J. JARBLUM

1 dhbr 1

2 THE COURT: I need for the government to
3 enlighten me about the theory of the government's case on
4 Count 4 because I must say so far I am singularly unimpressed,
5 and I think what we have been doing is retrying the con-
6 spiracy count. This takes me back to, what was it, two years
7 ago or a year and a half ago. This is just a replay, and
8 I don't understand the point of it

9 We have been at it all day today and the first
10 thing in the 4th count that is describe is something having
11 to do with Meridian Capital. We haven't even gotten there
12 yet.

13 MR. SABETTA: That is correct, your Honor.

14 THE COURT: And the next thing I want to find out
15 is, what are the securities in connection with the purchase
16 and sale of which the device and schemes to defraud were
17 employed.

18 MR. SABETTA: Yes, your Honor. Two fold.
19 I think the answer to that second question is the bill of
20 particulars specifies that by implication at least that the
21 securities in question are those securities, namely the
22 common shares of Microthermal being traded in the public
23 market over the counter from the period of time Count 4
24 deals with, and the shares of Microthermal which were
25 transferred or sold in connection with the last transaction

1 dhbr 2

2 involving Continental Engineering. Both of those cate-
3 gories, your Honor, are the ones on which the government
4 would rely in that respect.

5 THE COURT: Shares of common stock of Microthermal?

6 MR. SABETTA: We intend to put in evidence,
7 your Honor, and in fact I talked to Mr. Persky about
8 possibly stipulating to some of these facts, that
9 Microthermal was being traded throughout that period during
10 the over-the-counter market. And there was at no time any
11 disclosure made to any of the shareholders in any forum that
12 \$375,000 which had been declared to be in CD's was in fact
13 non-existent.

14 THE COURT: Well, I certainly am not going to
15 permit that. I will certainly dismiss the government's
16 case if that is all you are trying to prove. There's
17 not even any charge of that. That's not charged here.

18 The charge here is that in connection with
19 Meridian and the purchase of stock of U.S. Secretarial, all
20 these things were done.

21 MR. SABETTA: And Continental Engineering, your
22 Honor, the last transaction.

23 THE COURT: But there's nothing about Continental
24 Engineering to show any fraud on Continental Engineering.

25 MR. SABETTA: Your Honor, the theory of the

1 dhbr 3

2 case is at least, I guess, twofold. One is that the CD's
3 had been or the moneys, rather, had been misappropriated and
4 thereafter there was a course of conduct which operated as a
5 fraud on the public shareholders, among others, in that that
6 fact was continuously covered up and buried and there was a
7 failure to disclose the same throughout this period.

8 And in connection with these other transactions,
9 your Honor, expressly with respect to one of them, I recall,
10 there was a press release issued in connection with the
11 Meridian deal which refers to \$375,000 in assets in the
12 company of Microthermal which in fact were non-existent at
13 that point. That press release actually went out from,
14 I believe, Mr. Persky's office over the signature of one
15 of his associates.

16 There was a wilful failure in our view, at least we
17 believe the evidence would allow the jury to find, to state
18 certain facts, certain material facts, which were necessary
19 in order to correct statements of certain other facts and we
20 believe that the public --

21 THE COURT: Now wait.

22 You told me that these activities of Mr. Persky
23 and others acted as a fraud upon those who bought and sold
24 Microthermal shares over the counter.

25 MR. SABETTA: That is correct, your Honor.

1 dhbr 4

2 THE COURT: Because it was traded over-the-counter.

3 MR. SABETTA: Yes, your Honor, it was.

4 THE COURT: What is the fraud that is claimed?

5 MR. SABETTA: I think the entire course of the con-
6 duct is fraudulent in that it is designed to cover up the
7 fact that assets have been dissipated and to keep that fact
8 from the public shareholders.

9 THE COURT: You realize that is not alleged in the
10 indictment.

11 MR. SABETTA: Well, as I understand it --

12 THE COURT: There's nothing about concealing
13 anything in the indictment.

14 MR. SABETTA: That is correct, your Honor.

15 THE COURT: "Among the means by which the defendants
16 and others would effectuate the fraudulent scheme were
17 the following", and then there's a whole lot of transactions
18 about Meridian, nothing about any fraud in that connection,
19 cover up or concealment and then there's a transaction with
20 U.S. Secretarial, and then there's a transaction with
21 Continental Engineering.

22 MR. SABETTA: That is correct, your Honor.
23 I think your Honor has correctly said that that refers
24 to the means. It is simply a narrative of certain facts which
25 took place during that period.

1 dhbr 5

2 As I understand it, your Honor, it doesn't
3 purport to specify or particularize the fraud alleged in
4 Paragraph 1 of that count, which is admittedly drafted in
5 precise terms copying the statute or the rule more properly.
6 And as I look at the bill of particulars, of course, which
7 was supplied before I got into this case --

8 THE COURT: Where is the bill of particulars?
9 Do we have it, Mr. Clerk?

10 MR. SABETTA: I have our copy, your Honor.
11 May I say for the record I am looking at our copy of the bill
12 of particulars and also the demands for a bill of particulars
13 submitted by Mr. Persky's former counsel in this matter at
14 the earlier trial, and specifically, with reference to
15 Item No. 15 of the demand, it asks the government to
16 supply "With regard to Paragraph 1 of Count 4 set forth
17 to whom, and from whom shares of common stock of Micro-
18 thermal Applications, Inc. were sold and/or by whom
19 purchased."

20 And the government responded in its bill of
21 particulars, which is dated April 10, 1973, category 15, and
22 I quote "The government will produce records from
23 Microthermal's transfer agent as soon as they are available
24 to the government."

25 It seems to me, your Honor, quite clearly, at

1 dhbr 6

2 least by implication, that what the government was saying was
3 that it was relying for that aspect of the charge on the trading
4 of the public market and the over-the-counter market.

5 THE COURT: Is that all that the bill of particulars
6 tell us about the fraudulent scheme?

7 MR. SABETTA: Well, the demands, your Honor, go
8 no further.

9 THE COURT: We don't have any copy of the bill of
10 particulars?

11 THE CLERK: It is in the Court of Appeals, sir.

12 THE COURT: How are we going to be able to get it?

13 MR. SABETTA: I will be happy to supply the govern-
14 ment's copy. There are some markings which the Court can
15 disregard. This is our answer, your Honor.

16 There were no further demands, your Honor,
17 for greater particularization of the alleged fraud.

18 As a consequence, the fraud is alleged solely
19 in the language of the rule in the statute, and there is
20 no greater particularization.

21 MR. PERSKY: May I be heard a moment, your Honor?

22 THE COURT: Well, I take it then that the government
23 is precluded from relying on the sale of Microthermal
24 shares to Continental. It doesn't mention anything about
25 Continental in this bill of particulars.

1 dhbr 7

2 MR. SABETTA: I would say that that is not accur-
3 ate. That is not our view at least, your Honor. Our view
4 is that it can rely on both, as I think I tried to say at
5 least in my opening remarks on this issue.

6 In fact, there was a memorandum, a reply memor-
7 andum, that the government filed in response to certain
8 post-trial motions of Mr. Persky to dismiss Counts 4 and 5,
9 and in that memorandum, as I recall it, it was filed or pre-
10 pared by Mr. Velie of our office at that time, there was
11 a specific reference to the transfer or sale of Microthermal
12 shares in connection with Continental on this very issue
13 when it was raised. I think those papers -- I don't happen
14 to have with me -- but I do happen to recall them quite
15 clearly.

16 MR. PERSKY: Your Honor --

17 THE COURT: Yes.

18 MR. PERSKY: I think that what the government has
19 conceded here this afternoon takes us within the purview of
20 those cases in this district in the Court of Appeals which
21 say that in order to be or have a violation of 10(b)(5)
22 there must be proven a purchase or a sale by the person
23 accused of violating the rule.

24 Now, I think the government has conceded this
25 afternoon that insofar as they rely on the trading market,

1 dhbr 8

2 that Mr. Persky, the defendant, didn't make any purchases
3 or sales in that market and I think the case law is also
4 clear that mere corporate malfeasance, the theft by an
5 officer himself or a director, is not a 10(b)(5) violation.

6 Concededly the situation would be different if
7 there had been a new registration statement and the alle-
8 gation was that the theft by Galanis and Yamada
9 had been conceded in that and new shares were sold.

10 I think as to the second part that your Honor put
11 your finger on the heart of the matter. Mr. Sabetta,
12 who of course is not responsible for this bill of particulars,
13 but the U.S. Attorney's office is, looks at 15 and when we ask
14 as set forth "To whom and from whom shares of common stock
15 of Microthermal was sold and/or by whom purchased", the
16 answer is "The government will produce records of
17 Microthermal's transfer agent as soon as they are available
18 to the government." That was back in 1973. They never
19 produced anything since that date and if they were relying
20 on continental, they already knew that. They should have
21 set it forth. And by omitting they were saying almost
22 directly, and not even by implication, that what they were
23 relying on was the trading market.

24 If we go to Continental, Mr. Sabetta in his opening
25 conceded or claimed that the government's position is

1 dhbr 9

2 that in that transaction the U.S. Secretarial shares were
3 valued at \$1 or zero, I forget his exact number. So there's
4 no fraud alleged in that.

5 MR. SABETTA: Your Honor, may I respond?
6 Because I think --

7 THE COURT: This isn't the end of the government's
8 case. But I must say I think the government's case is about
9 as poor a case as I can imagine.

10 MR. SABETTA: I disagree respectfully with the
11 Court.

12 THE COURT: It is going to almost clearly be
13 dismissed at the end of the government's case.

14 MR. SABETTA: Your Honor, I may be laboring --

15 THE COURT: It's just beating a dead horse.
16 We tried this case once and all we have been doing today
17 is retrying the case that we already tried.

18 MR. SABETTA: I don't fully agree with the
19 Court in that respect. I would like to say this:

20 I have no intent to try the old case. I think
21 what I said at side bar is our continuing position, that is,
22 that certain of these earlier events in connection with
23 Mr. Persky's knowledge of the falsity of the filing of the
24 10-K is important to the second half of the case, and
25 I don't understand the law to be that the person who either

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1 dhbr 10

2 buys or sells the securities must be the person who is de-
3 frauded or is doing the defrauding.

4 And I can supply the Court with cases tomorrow
5 morning including a Supreme Court case which says quite
6 clearly to the contrary; that it is the fraud which is the
7 kernel of the crime, and any sale or purchase of securities
8 committed in the course of that fraud suffices to make out
9 a 10(b)(5) violation or charge.

10 THE COURT: Yes, Microthermal didn't sell any shares.
11 Persky didn't sell any shares. Kaplan didn't sell any shares.

12 MR. SABETTA: That's not my understanding of the
13 law, your Honor, that that is what is required. Maybe I am
14 grossly misapprehending what the law is but I don't think so.
15 I will endeavor to look at it very carefully tonight. In
16 fact, we are preparing a memorandum on this very issue
17 but I don't understand the law to be that the person charged
18 must in some way be directly responsible for the purchase
19 or sale of the securities. It suffices that in the
20 course of the fraud there is a purchase or sale of securities
21 that makes out a 10(b)(5) charge.

22 THE COURT: You mean even if Persky had nothing
23 whatever to do with the purchase or the sale of the secur-
24 ities?

25 MR. SABETTA: Indeed I would think that in the

dhbr 11

case of trading in the over-the-counter market that is precisely the case. The government doesn't intend to show that Mr. Persky directly or personally caused a given buyer or seller in the market to buy or sell during the course of Counts 4 or 5. It suffices that Mr. Persky engaged in a course of conduct which operated to defraud those buyers and sellers, to wit, the events alleged in Count 4 and, more specifically, as I referred to earlier, press releases, other statements which might find their way to the public area, which represented falsely that the company had \$375,000 in cash assets, which a buyer or seller in the market might rely on, truly as a material fact in making an investment decision. The failure to state the fact that it was not there when he then and there knew that to be the fact, suffices in our view to make out the charge of a 10(b)(5) violation.

THE COURT: Have you ever found a criminal prosecution for violation of a 10(b)(5)?

MR. SABETTA: I can't answer that.

THE COURT: I understand that there never has been any such, but my research has developed no instance of where there has ever been a criminal prosecution.

MR. SABETTA: Your Honor, Mr. Green informs me that there are such cases.

1 dhbr 12

2 THE COURT: I would certainly like to see one.
3 We haven't found it.

4 MR. SABETTA: I would be happy to supply it if I can
5 find it and I'll do whatever I can immediately after court.

6 THE COURT: I guess I have done as much as we
7 can do this afternoon.

8 I thought it wouldn't be right for me to have
9 these grave doubts, Mr. Sabetta, without drawing them to
10 your attention.

11 MR. SABETTA: I appreciate the Court's bringing this
12 up at this time and we will provide some sort of memorandum
13 tomorrow morning on this issue and, if possible, even later
14 today.

15 MR. PERSKY: If your Honor please, this morning
16 you instructed me to withhold the motion on venue until
17 the close of the government's case and I assented eagerly
18 because it is true that on the face of the indictment it
19 didnt' show where that report should be filed.

20 Now, the government has put on its expert witness
21 who has testified that the report should have been filed in
22 Washington and I would like your Honor to consider at this
23 time, reconsidering your earlier deferral of that motion.

24 There is a Supreme Court case that says where
25 there is an omission, that clearly venue should be laid in

1 dhbr 13

2 the place where there is the filing to be made, and in the
3 Cummerford case in this circuit there is the same decision.
4 That is, where a document must be filed with a government
5 agency and there's an omission to do so, and there's a criminal
6 case for it where venue is only proper in the district where
7 the act should be performed.

8 MR. SABETTA: I don't dispute Mr. Persky's
9 analysis of the issue, your Honor, but I think what he is
10 overlooking is this distinction, namely, that that count
11 charges a violation of the provisions regarding the filings
12 of 8-K but it also charges Section 2 of Title 18.

13 In our view the theory upon which this case should
14 be submitted to the jury on that count is that Mr. Persky
15 aided and abetted the failure to file, and there are cases
16 which quite clearly say that in failure-to-file cases the
17 principal may only be charged with respect to venue in the
18 district in which the filing was required to have been made.
19 But one who aids and abets or induces or procures not
20 to so file, may be charged in the district where he acts
21 in that manner.

22 And I would be prepared to supply the Court
23 with that, those cases, as well on that issue.

24 THE COURT: Who was required to file?

25 MR. SABETTA: The language of the statute,

1 dhbr 14

2 I think, or the rules, regs and statutes says the issuer or
3 the registrant; but, of course, it can act only through
4 human agents.

5 THE COURT: Oh, I see.

6 In other words, your theory is that Mr. Persky
7 aided and abetted Microthermal, the registrant, in its
8 failure to file?

9 MR. SABETTA: Yes, your Honor, that's right.

10 THE COURT: And that your undertaking, that you
11 put in evidence this morning, was an undertaking by
12 Microthermal?

13 MR. SABETTA: That is correct, your Honor.

14 THE COURT: So the theory is aiding and abetting?

15 MR. SABETTA: Yes, your Honor.

16 THE COURT: Well, that strikes me as having logic
17 to support it.

18 Are you moving now, Mr. Persky, to dismiss for
19 want of proper venue?

20 MR. PERSKY: I was really moving for you to
21 reconsider whether you would hear a full argument or briefing
22 prior to the end of the government's case and I gather
23 from what you are saying you would prefer for us to wait
24 until the end.

25 THE COURT: Yes, and as I am presently advised,

1 dhbr 15

2 I think, under the government's theory of the case, I
3 ought to submit it as a case properly brought here.

4 I don't think the ground of the motion is well
5 taken.

6 All right.

7 Mr. Clerk, we will be in recess until tomorrow
8 at 9:30.

9 (Whereupon, an adjournment was taken to
10 Tuesday, January 14, 1975, at 9:30 a.m.)
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1 dh/lf Galanis-Recross 369

2 Q You do understand the indictment comes first?

3 A I would think so, sir.

4 Q And the United States Attorney initiates that?

5 A I would think so, yes, sir.

6 MR. PERSKY: Thank you, Mr. Galanis.

7 THE COURT: Anything else?

8 MR. SABETTA: No, sir.

9 (Witness Excused)

10 THE COURT: Next witness.

11 MR. SABETTA: Your Honor, I'm sorry to acknowledge

12 that based on certain representations of the defense as to

13 how long their case will be, the witness is down in my

14 office. I can get the witness up here promptly with a certain

15 delay.

16 THE COURT: Well, it's a quarter to five. I

17 think I will excuse the jury now.

18 Ladies and gentlemen of the jury, Mr. Foreman,

19 keep in mind my instruction not to discuss the case amongst

20 yourselves or with anybody else. We will start in tomorrow

21 morning at 9:30. Thank you very much.

22 (Jury Excused)

23 THE COURT: I continue to sit here and listen to

24 the evidence and I have read a case on appeal from Judge

25 Weinfeld which is a criminal prosecution under 10 (b) (5).

dh/lf

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My law clerk has found a decision by Judge Griesa in a criminal case under 10 (b) (5). And in respect of the language about in connection with the purchase and sale of securities, I have read the Banker's Life part of it, but, Mr. Sabetta, I continue to be greatly troubled about count four because I continue to ask myself on whom did any fraud or scheme or device operate? Now, you're telling me, you told me yesterday, that it operated on those who purchased and sold shares of Microthermal over-the-counter.

MR. SABETTA: And, your Honor, those who hold or did hold Microthermal shares during that period of time and whose investment judgment might have been affected had the truth been known.

May I amplify on that, your Honor, briefly? We intend to put in evidence, it's not yet in evidence, a Notice to Shareholders regarding the proposed Microthermal-Meridian transaction. That notice to shareholder is dated October 5, 1970, it was actually held on October 20, 1970. And we believe that there are material misrepresentations made in that Notice to Shareholders regarding the assets which would be left in Microthermal following the consummation of the proposed transaction, and the Notice to Shareholders, your Honor, is signed by Robert Persky, as secretary of the corporation.

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dh/lf

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Now, it seems to us quite respectfully that if there is a material misrepresentation in this Notice to Shareholders as well as the various press releases that we alluded to yesterday, or if there was a failure to state certain facts, certain material facts, necessary in order to make other facts already stated clear and not misleading or false, then a 10 (b) (5) violation has been stated.

In practical terms, your Honor, frankly, if the shareholders of Microthermal at or about the time of this notice to them had any idea that Microthermal was at that point little more than a shell rather than a company with approximately \$400,000 in very liquid assets, it is certainly not unreasonable to conclude that some of them might have wished quite suddenly to sell their stock in Microthermal or some of those who purchased during that period might well have decided not to purchase that stock if they had known the truth of what existed at that point in time.

And I can't believe that 10 (b) (5), as I read the cases, doesn't predescribe the kind of conduct that is alleged here.

THE COURT: Well, the conduct alleged here, you pointed to, is a notice of special meeting of shareholders. I hadn't seen it but, if course, I will give consideration to it.

1 dh/lf

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2 MR. SABETTA: Not only that, sir, we have mentioned
3 the press releases.

4 THE COURT: What press releases?

5 MR. SABETTA: They're not in evidence yet, sir.
6 I'm referring to this now and it's not in evidence.

7 THE COURT: What is the press release's subject
8 matter?

9 MR. SABETTA: There are several press releases,
10 depending upon various points in time.

11 THE COURT: Well, they have to be related, of
12 course, to the crime charged and they have to be related to
13 Meridian, U. S. Secretarial or Continental.

14 MR. SABETTA: And they are.

15 THE COURT: They are?

16 MR. SABETTA: I have one in mind that relates to
17 Meridian which was released. Subsequent to the signing of
18 the agreement on August 13th, which is now in evidence, between
19 Meridian and Microthermal. And in that press release there's
20 a reference to certain cash assets. I don't remember the
21 exact language but there is the number \$375,000, as I recall.

22 And that is quite clearly, if the government's evi-
23 dence is viewed in a light most favorable to it, false at the
24 time it was issued. Now, we submit it would be for the jury
25 to find whether it was knowingly false or innocently false or

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1 dh/lf

2 whatever and whether Mr. Persky had any role in it. But I
3 think, your Honor, there will be, by the close of the
4 government's case, sufficient evidence to make out a prima
5 facie case under this count.

6 THE COURT: Well, I will keep an open mind. I'm
7 certainly not very impressed so far. I think we are retrying
8 count one again.

9 MR. SABETTA: I disagree with the Court respect-
10 fully.

11 THE COURT: The count was submitted to the jury
12 a year and a half ago, and we are just retrying it.

13 MR. SABETTA: May I ask the Court to give me
14 some guidance as to the specific issues that your Honor is
15 troubled with so that I might try to frame perhaps a memoran-
16 dum of fact and law?

17 THE COURT: Yes. Who was to be affected by the
18 scheme to defraud? And in connection with what purchase
19 and sale of securities?

20 Now, nonsense was stated in some memorandum that
21 I have seen that Continental was defrauded. Now, that, of
22 course, is just absolute nonsense. I take it we're agreed
23 we just put that to one side. There is no claim here that
24 Continental was defrauded.

25 MR. SABETTA: I don't think so, your Honor. If I

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1 dh/lf

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2 remember correctly, I may be mistaken, but I thought that
3 the reference to Continental had to do with the sale of
4 Microthermal shares as opposed to the argument that they were,
5 in fact, a party defrauded.

6 As I read the -- I don't remember the Supreme
7 Court case --

8 THE COURT: Banker's Life.

9 MR. SABETTA: Banker's Life. That seems to say
10 that the gist of the crime is the fraud and any purchase or
11 sale in connection with it is sufficient to establish that
12 element of the crime. And I think the reply answer by the
13 earlier memorandum in this case on the Microthermal-Continental
14 Engineering deal dealt only with the attack on the count four
15 on its face as having failed to state that there was some
16 transfer or sale or purchase of Microthermal shares as
17 alleged and that was picked out as one such transfer or sale
18 of shares.

19 As I read the law --

20 THE COURT: If all that you are going to show is
21 that Microthermal shares were transferred to Continental,
22 that is not enough in my judgment to bring it under 10 (b) (5)
23 but I wouldn't pay any attention to that.

24 MR. SABETTA: No, I think what is involved here is
25 a course of conduct which was designed to cover up --

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dh/lr

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1 THE COURT: That's count one. We have tried that
2 already.

3 MR. SABETTA: Well, count one --

4 THE COURT: This is a course of conduct in which
5 abortive negotiations with Meridian took place and in which
6 there was a transaction with U. S. Secretarial, and you may
7 be able to show sufficient publicity in the form of letters
8 to shareholders, press releases and the like to constitute a
9 scheme to defraud. You might. I haven't seen it yet. But
10 that's why I say I will naturally reserve judgment.

11 MR. SABETTA: I don't think respectfully, your
12 Honor, this is count one at all because the elements the
13 government was required to establish in count one or two,
14 whichever way you look at it, are very different elements
15 from what is required to be established here.

16 THE COURT: Basically it's the same and it's
17 over-kill on the part of the government. You had a fair
18 chance at it. Basically it's the \$480,000 that was sent up
19 from Microthermal to Takara Partners, and I can remember
20 back now almost two years or a year and a half, I can remember
21 going through all of this. Now, the government shouldn't
22 have more than one fair chance, and they had one fair chance,
23 and the defendants were acquitted.

24 So that while, of course, I have to be like the
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2 jury, fair and impartial to the government and fair and im-
3 partial to the defendant, I just have to say that it is hard
4 for me to get into sympathy for the government's position.
5 It's hard for me to get into sympathy for them or, as a
6 lawyer, to understand the theory of the government's case.
7 But I'm doing the best I can. All right. Let's start in now.
8 Do we have the witness for tomorrow and Mr. Persky has some
9 3500 material.

10 MR. SABETTA: We're going to have to give him more.
11 He has some already for one witness. We'll give him some
12 more.

13 (An adjournment was taken to 9:30 a.m., January
14 15, 1975.)

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Received ¹ copies of the within
Appendix
this 25 day of April, 1975.

Sign _____

For: Paul J. Curran Esq(s).

Att'ys for

Plaintiff Appellee

